

.S117834  
**IN THE SUPREME COURT OF CALIFORNIA**

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MARK BURTON, Petitioner,

v.

KEVIN SHELLEY as Secretary of State etc., Respondent.

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My basis for denying the petition is this:

A writ of mandate may issue to compel a public official to perform a ministerial duty (Code Civ. Proc., § 1085, subd. (a); *Schmitz v. Younger* (1978) 21 Cal.3d 90, 92-93), or to exercise discretion (*State of South Dakota v. Brown* (1978) 20 Cal.3d 765, 779-780). But it will not issue to control the manner in which a public official, particularly a constitutional officer like the Secretary of State, exercises discretion. (See *Anderson v. Phillips* (1975) 13 Cal.3d 733, 737; *Lindell Co. v. Board of Permit Appeals* (1943) 23 Cal.2d 303, 315.)

The constitutional and statutory provisions governing recall elections vest discretion in the Secretary of State to adapt regular election procedures for use in recall elections, and in particular to adapt procedures for use in qualifying candidates to appear on the recall election ballot to replace the governor in the event the recall succeeds. Faced with a highly confusing statutory scheme, he has exercised his discretion by choosing the method that, in his professional judgment, is the most practical. This procedure was adopted by former Secretary of State March Fong Eu, a Democrat, and it was then followed by former Secretary of State Bill Jones, a Republican. It has been used in each of the four recall elections that has been held in the past ten years. I join in denying the petition because, in my view, it improperly seeks to control the Secretary of State's exercise of discretion. My colleagues have offered additional grounds for denying the petition; although these may well be persuasive, I see no reason to address them.

Moreover, any intervention by this court at this time would interfere with the recall election as presently scheduled. The recall has qualified overwhelmingly for the ballot, and the wisdom of holding the recall election is not before this court. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 795.) To postpone the election would thwart the will of the People, who have spoken. Petitioner has argued in effect that the Secretary of State has made it *too easy* for candidates to qualify for the recall ballot. This court should not postpone the election just because there may be *too many* candidates on the ballot, giving the People too many choices.

**KENNARD, J.**

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*Associate Justice*

